

Lei (Migration) [2024] AATA 1166 (9 May 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms Ut Lei Lei
REPRESENTATIVE:	Ms Windi Ho (MARN: 0106887)
CASE NUMBER:	2111268
HOME AFFAIRS REFERENCE(S):	BCC2019/6430997
MEMBER:	Tegen Downes
DATE:	9 May 2024
PLACE OF DECISION:	Brisbane
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2) of Schedule 2 to the Regulations • cl 820. 221(1)(a) of Schedule 2 to the Regulations • reg 2.03A

Statement made on 09 May 2024 at 12:26pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – sponsor’s resident return visa cancelled after criminal conviction – set aside on review – genuine and continuing relationship – financial, household and social aspects of relationship and nature of commitment – one child and second pregnancy – compelling corroborating evidence – consent to decision without hearing – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65, 501
Migration Regulations 1994 (Cth), r 2.03A, Schedule 2, cl 820.211(2)(a), 820.221(1)(a)

CASES

Ally v MIAC [2008] FCAFC 49
He v MIBP [2017] FCAFC 206

Jayasinghe v MIMA [2006] FCA 1700
MIEA v Poche (1980) 4 ALD 139

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under section 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 3 December 2019 based on her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 820.221(2)(a) of Schedule 2 to the Regulations because, after the application was made, the sponsor's Resident Return Visa was cancelled and accordingly, the applicant was no longer the de facto partner of an Australia permanent resident.
4. The applicant was represented in relation to the review. The representative filed comprehensive written submissions and supporting documentation, which were of great assistance to the Tribunal.
5. The applicant did not appear before the Tribunal because she consented to the Tribunal making a decision on the papers. Accordingly, s 360 of the Act does not apply.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

7. ISSUE AND LAW

8. This review application relates to an application for a provisional partner visa to enable the applicant to remain in Australia on a temporary basis.
9. The first issue in this review application is whether, at the time the visa application was made, and at the time of this decision, the applicant is the de facto partner of an Australian permanent resident, for the purposes of cl 820.211(2)(a) and cl 820.221(1)(a) of the Regulations.
10. 'De facto partner' is defined in s 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
11. In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the couple's household and their commitment to each other, as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.
12. In forming a view of the relationship at the time of application, the Tribunal must consider all relevant evidence, which may include evidence of events after the date of application insofar as it assists in the task of determining whether the visa applicant and the sponsor were in

a partner relationship at the time of the application. Evidence of events after the visa application is relevant if it tends logically to show the existence or non-existence of facts relevant to the issue to be determined: *Ally v MIAC* [2008] FCAFC 49 at [32]–[35]; *Jayasinghe v MIMA* [2006] FCA 1700 at [35], citing *MIEA v Poche* (1980) 4 ALD 139.

13. If the primary issue is resolved in the applicant's favour, the secondary issues are whether, at the time of the visa application and at the time of this decision, the applicant satisfies the other requirements of cl 820.211 and cl 820.221(1)(a) of Schedule 2 to the Regulations and reg 2.03A.

CONSIDERATION OF CLAIMS AND EVIDENCE

14. Background

15. The applicant is a 33-year-old woman from Macao. She claims to be in a de facto relationship with the sponsor, a 35-year-old Australian permanent resident who was born in China. The sponsor has been separated since 2017, with two children from his marriage.
16. At the time the applicant applied for the visa that is the subject of this review, she held a valid Student Visa.
17. The couple claim to have first met in 2013 and to have become friends. They claim to have commenced a de facto relationship in April 2019, to have welcomed their first child in March 2020 and to be expecting their second child in June 2024.
18. In March 2021, the sponsor's visa was cancelled under s 501 of the Act after the sponsor was convicted of offences by the District Court of New South Wales and then the New South Wales Court of Appeal. The sponsor was ultimately sentenced to 3 years and 10 months of imprisonment, with a non-parole period of 2 years.
19. In August 2023, the Tribunal (differently constituted) set aside the sponsor's visa cancellation and the sponsor's permanent residency was reinstated. Accordingly, the reason for which the delegate refused the applicant's visa no longer applies.
20. The couple provided detailed written statements to the Tribunal about their relationship, which were supported by compelling corroborating evidence. I accept the couple's claims as true based on the material before me and am satisfied that they are in a genuine and continuing relationship that meets the definition of a de facto partnership.

Are the couple in a de facto relationship

Financial aspects of the relationship

21. The couple claim to have opened a joint account with the Commonwealth Bank in March 2019, a joint account with ING in February 2024 and to have obtained a loan from ING to purchase a property in February 2024. At the time of application, they claim that the sponsor paid for rent and the applicant paid for bills and living expenses. At the time of decision, they claim that the sponsor pays the home loan and the applicant pays their living expenses.
22. The couple submitted evidence to the Tribunal, including bank statements for both joint accounts which demonstrate that the applicant and the sponsor regularly contribute to the joint accounts and that the Commonwealth Bank account is used for utilities, groceries and other ordinary expenses, a selection of bank statements for the couple's personal accounts, and a letter from ING providing formal approval of their loan application. This evidence broadly corroborates the couple's claims and accordingly, I accept them as true.

23. I find that, at the material times, the couple have joint assets, pool their financial resources, and share day-to-day household expenses in a manner consistent with a de facto relationship. I also find that, at the time of decision, the couple have a joint liability, which they did not have at the time of application. The couple do not claim to owe any legal obligations to the other party and I make a finding accordingly. I find that, at the material times, the financial aspects of the relationship are indicative of a de facto relationship, as defined in the Act.

24. *Nature of the household*

25. The couple claim to have lived together at different addresses over the course of their relationship, aside from the period where they temporarily lived separately while the sponsor was incarcerated. They provided evidence to the Tribunal by way of written statements as to their daily lives and the division of housework and childcare responsibilities. They also provided documentary evidence to support their claims, including correspondence addressed to them at the various addresses, tenancy agreements, joint utility accounts, drivers' licences citing the joint addresses, and correspondence with the couple's childcare provider.
26. I accept this evidence and find that, at the material times, the couple have lived together, that they have established a joint household, and that they share housework in a manner consistent with a de facto relationship. I also find that, at the time of decision, the couple share joint responsibility for the care and support of their child (and note that this consideration was not applicable at the time of application). At the material times, the nature of the household is indicative of a de facto relationship, as defined in the Act.

27. *Social aspects of the relationship*

28. There is compelling evidence before the Tribunal regarding the social aspects of the relationship: including photographs of the couple with friends and family over the course of their relationship; written statements and statutory declarations from friends and family; and evidence that the couple have declared their relationship to their superannuation funds, Centrelink, and the Australian Taxation Office. The couple also detailed their social activities in written statements.
29. I accept this evidence and find that, at the material times, the couple represent themselves to other people as being in a de facto relationship, that the couple's family, friends and acquaintances believe the relationship between the couple to be genuine and continuing, and that the couple plan and undertake joint social activities. The social aspects of the relationship are indicative of a de facto relationship, as defined in the Act.

30. *Nature of persons' commitment to each other*

31. The couple has been in a de facto relationship and lived together (aside from the sponsor's period of incarceration) for approximately five years. They provided written statements detailing how they support each other, the importance of their relationship to each other and their future plans. They also provided documentary evidence to support their claim that the applicant maintained regular contact with the sponsor during his period of incarceration, that the sponsor is the father of the applicant's child and that they are expecting another child in June 2024.
32. I accept this evidence and find that the couple draws companionship and emotional support from each other commensurate with a de facto relationship and that they see the relationship as long term. I find that, at the material times, the nature of the commitment is indicative of a de facto relationship, as defined in the Act.

33. *Conclusion*

34. Having regard to the findings set out above, I am satisfied that, at the material times, the couple have a mutual commitment to a shared life to the exclusion of all others, that the relationship is genuine and continuing and that the couple live together or do not live separately and apart on a permanent basis for the purposes of s 5CB(2)(a) to (c) of the Act. In the absence of any evidence, I am also satisfied that the couple is not related by family for the purposes of s 5CB(2)(d) of the Act.
35. Accordingly, I am satisfied that the requirements of s 5CB(2) are met and that, at the time the visa application was made and at the time of this decision, the couple is in a 'de facto relationship' as defined in the Act. Therefore, the applicant meets cl 820.211(2)(a) of Schedule 2 to the regulations as the applicant is the de facto partner of the sponsoring partner, who is an Australian permanent resident.

36. **Are the additional criteria for a de facto relationship met?**

37. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
38. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009).
39. The applicant has provided evidence that the relationship is registered under the *Births, Deaths and Marriages Registration Act 1995* (NSW). Accordingly, the 12-month requirement does not apply.
40. For these reasons, I am satisfied that the applicant meets the additional criteria prescribed in reg 2.03A.

41. **Are the other visa criteria met?**

42. As the primary issue has been resolved in the applicant's favour, it is incumbent on the Tribunal to consider whether the applicant met the other requirements of cl 820.211(2) of Schedule 2 to the Regulations at the time of application, and whether the applicant continues to meet those requirements at the time of this decision, in accordance with cl 820.211(1)(a).
43. For the following reasons, the Tribunal is satisfied that these requirements are met.
44. Clause 820.211(2)(c)(i) requires that, if the applicant's spouse has turned 18, the applicant is sponsored by the spouse of the de facto partner. Reg 1.20 relevantly provides that the 'sponsor' of an applicant is a person who provides an undertaking to assist the applicant, to the extent necessary, financially and in relation to accommodation during the period of two years immediately following the grant of the temporary visa.
45. There is evidence before the Tribunal that the sponsor completed the department's online Sponsorship for a partner to migrate to Australia, which included the relevant undertaking, on or about 3 December 2019. There is no evidence before the Tribunal that the sponsor has withdrawn his sponsorship. Accordingly, I am satisfied that at the material times, the applicant was and is sponsored by their spouse in accordance with cl 820.211(2)(c).

46. Clause 820.211(2)(d) only applies to an applicant who was not the holder of a substantive visa at the time of application. As the applicant held a substantive visa at the time of application, it does not apply.
47. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

48. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211(2) of Schedule 2 to the Regulations
 - cl 820. 221(1)(a) of Schedule 2 to the Regulations
 - reg 2.03A

Tegen Downes
Member